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TAN CHING WEE & ORS v. GOLD MART SDN BHD; BASIL THOMAS GIMINO & ORS (PROPOSED INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[ORIGINATING SUMMONS NO: WA-24NCC-304-05-2023]
B 17 SEPTEMBER 2024

Abstract – *A court, in its supervisory role, must protect the will of the majority in a court-convened creditors' meeting ('CCM'). Therefore, once a proposed scheme of arrangement ('SOA') meets the statutory majority of 75% of those who attended the CCM, the court must give effect to it and ought not to be swayed by certain groups that formed the minorities. In fact, the minorities are also bound by the terms of the proposed SOA.*

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CIVIL PROCEDURE: *Intervener – Application for – Application by interveners to be excluded from proposed scheme of arrangement ('SOA') – Proposed SOA met statutory majority of more than 75% at court-convened creditors' meeting ('CCM') – Whether court should give effect to majority views at CCM – Whether interveners fell within same SOA – Whether interveners motivation purely monetary reasons – Whether rank equally as unsecured creditors together with all scheme creditors – Whether interveners bound by proposed SOA and its terms – Whether interveners ought to withdraw proceedings in other courts – Companies Act 2016, s. 366(3)*

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COMPANY LAW: *Scheme of arrangement – Approval of – Court convened creditors' meeting ('CCM') – Proposed scheme of arrangement ('SOA') met statutory majority of more than 75% at CCM – Whether primary objective of proposed SOA met – Whether interveners fell within same SOA – Whether interveners bound by proposed SOA and its terms – Whether court should give effect to majority views at CCM – Whether proposed SOA ought to be sanctioned – Companies Act 2016, s. 366(3)*

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The plaintiffs were the purchasers of units at Harbour City Resort @ Harbour City ('project'). Due to a delay in the delivery of vacant possession of the units in the project, the defendant was liable for liquidated and ascertained damages ('LAD'). A proposed scheme of arrangement ('SOA') was then filed by the plaintiffs who comprised of 660 purchasers of the project. The objective was to see if the LAD payments due could be paid without compromising the ability of the defendant to complete the project. The plaintiffs obtained leave to commence a court-convened meeting ('CCM'). A restraining order ('RO') was also granted on the same day after which the court convened creditors' meeting under the proposed SOA. The SOA was approved by 80.02% of the scheme creditors. The sole issue in the plaintiffs' application in encl. 45 was whether the court was satisfied that the majority vote of 80.2% achieved at the CCM could be upheld and thereafter sanction the SOA. There were two sets of interveners herein. The interveners in encl.

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15 entered into a sale and purchase ('SPA') of a commercial unit in the project with the defendant. However, due to the delay in the delivery of vacant possession of the unit, the interveners terminated the SPA and filed an action at the Sessions Court. The Sessions Court affirmed the termination of the SPA as valid and ordered a refund but refused the LAD claim. The intervener appealed to the High Court, and the matter had been stayed pending the determination of this proceeding. The intervener's case herein, *inter alia*, was that they were wrongly included into the SOA as they no longer fell under the class of creditors in the SOA and sought a declaration to be allowed to proceed with the pending suit. The application in encl. 57 by the interveners were, *inter alia*, for: (i) leave to continue the civil suit at the Melaka Sessions Court ('Melaka Suit'); (ii) a declaration that the interveners be allowed to proceed with the Melaka Suit; and (iii) the interveners' names be removed from the proposed SOA.

Held (allowing encl. 45; dismissing encls. 15 and 57 (except application to intervene to participate in the arguments for issuance of sanction under encl. 45)):

(1) There are three stages that must be passed before a SOA is approved or sanctioned by a court: (i) either the company, creditors, members of the company liquidator or judicial manager may apply to the court for leave to convene a creditors' meeting; (ii) the proposed scheme is presented at the meeting to be agreed upon by a majority of 75% of total value of creditors present and voting, either in person or by proxy; and (iii) upon obtaining the requisite approval, a further order by the court is to be obtained to approve the SOA. The primary objective of the proposed SOA was to complete the project to ensure that the scheme creditors get the units they contracted to purchase with a discounted amount of LAD. The court was satisfied that the first two stages had been complied with. (paras 13-15)

(2) The interveners, as purchasers who entered into an agreement to purchase the units within the cut-off period, fell squarely within the scheme by virtue of the definition of scheme creditors. Once the proposed SOA passed the requisite threshold of 75% of those who attended the meeting, the interveners were bound by the proposed scheme and the terms stated therein. As such, the proposed SOA was addressing the right class of creditors. (paras 20, 21 & 23)

(3) The termination of the SPA was mutual and was agreed upon before the proposed SOA was mooted. The purchasers who had terminated the SPA had been rightly excluded from the proposed SOA. The exclusion of certain group of purchasers had been made known openly and no material information was kept away from the purchasers who voted at the meeting. Hence, the interveners' application in encl. 15 was dismissed. (paras 36, 39 & 40)

(4) The court, in its supervisory role, should not override the majority views of the plaintiffs as purchasers. If the outcome of the voting at the CCM achieves 75% support of those attending the CCM as stipulated under s. 366(3) of the Companies Act 2016 ('CA'), the SOA is deemed to be approved. There were 80.2% of the scheme creditors who voted in favour of the SOA. Irrespective of whether the outcome of the creditors' meeting turned out to be in favour of the interveners or not, they were bound by the decision of the majority of scheme creditors and was estopped from seeking leave to continue with the Melaka Suit and were required to withdraw the Melaka Suit. If a declaration was allowed and the suit was allowed to continue against the rest of the defendants, there would be adverse implications against the proposed SOA. (paras 55-59 & 61)

(5) Where the creditor's claim is purely monetary in nature, courts will unlikely grant leave. The motivation of the interveners was purely for monetary reasons, to avoid the cram down provision under s. 366(3) of the CA. The cram down provision has the effect of reducing the amount owed to the creditor, which was what the interveners intended to avoid. The interveners ranked equally as unsecured creditors together with all the scheme creditors under the SOA and equity and fairness dictated that interveners should not be afforded preferential treatment over other unsecured creditors. Hence, given that the outcome of the Melaka Suit would impede the success of the SOA, leave ought not to be granted (paras 65, 66, 69 & 70)

(6) There was no merit in the interveners' arguments that the information in the explanatory statement ('ES') had not been verified or confirmed as true. The ES was merely a document that gave a general proposal of how the scheme would be carried out. It was also meant to be read by those interested, at the CCM, before they voted. The ES had been reviewed and approved by the board of the defendant and the directors of the defendant had collectively accepted full responsibility for the accuracy and information contained in the ES after having made all reasonable enquiries. The fact remained that 80.02% of purchasers who attended the CCM on that day understood the terms contained in the ES and eventually, approved the scheme. Other trivial issues raised by the interveners were also collectively rejected as those who attended the meeting were given ample opportunity to consider the SOA and they voted in favour of the scheme after considering the proposal put forward. (paras 86-89)

Case(s) referred to:

AES Barry Ltd v. TXU Europe Energy Trading (In Administration) [2004] EWHC 1757 ***(refd)***

McCartney & White v. Nortel Networks v. Nortel Networks [2010] EWHC 826 ***(refd)***

MDSA Resources Sdn Bhd v. Adrian Sia Koon Leng [2023] 7 CLJ 843 FC ***(refd)***

Re Top Builders Capital Bhd & Ors [2021] CLJU 597; [2021] 1 LNS 597 HC ***(refd)***
Top Builders Capital Bhd & Ors v. Seng Long Construction & Engineering Sdn Bhd & Ors [2022] CLJU 21; [2022] 1 LNS 21 HC ***(refd)***
Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors [2012] 9 CLJ 1071 HC ***(refd)***

Legislation referred to:
Companies Act 2016, s. 366(3)

For the plaintiffs - Mark Ho & Eldarius Yong; M/s Chellam Wong
For the defendant - Choong Jun Hong; M/s Chee Siah Le Kee & Partners
For the 2nd & 3rd interveners - Ronald Ang; M/s Nora SW Lam & Assocs
For the 4th & 5th interveners - WL Bong; M/s Bong & Partners
For the 6th, 7th & 8th interveners - Sanjay Nathan; M/s Saibullah MV Nathan & Co

Reported by S Barathi

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

Introduction

[1] The plaintiffs *vide* encl. 45 sought sanction to be issued by the court for the scheme of arrangement ("SOA") given that they have met the statutory majority of more than 75% of those attending the court-convened meeting ("CCM"). I allowed the application.

[2] Two sets of interveners, who were allowed to participate in the proceedings in encls. 15 and 57 appealed against the decision of this court:

(i) granting the sanction for the SOA;

(ii) dismissing leave application to proceed with existing legal proceedings against the defendant; and

(iii) dismissing their application to be excluded from the SOA.

Brief Facts

[3] The plaintiffs are purchasers of units at Harbour City Resort @ Harbour City ("the project").

[4] Due to delay in delivery of vacant possession of the units in the project, the defendant was liable for liquidated and ascertained damages ("LAD").

[5] A proposed SOA was then filed by the plaintiffs, who comprised of 660 purchasers of the project. The objective, in a nutshell, was to see if the LAD payments due could be paid without compromising the ability of the defendant to complete the project.

[6] On 12 June 2023, the plaintiffs obtained leave to convene a CCM. A restraining order ("RO") was also granted on the same day. Thereafter, the court-convened creditors' meeting under the proposed SOA was conducted on 8 September 2023. The SOA was approved by 80.02% of the scheme creditors.

Enclosure 45

Issue

[7] The sole issue to determine is whether the court is satisfied that the majority vote of 80.2% achieved at the CCM can be upheld and thereafter sanction the SOA.

Analysis

Salient Features Of The SOA

[8] As at the cut-off date (2 June 2020), the defendant is indebted in the sum of RM108,749,518.51 as LAD to the purchasers (including the plaintiffs) for late delivery of vacant possession.

[9] Based on the defendant's projection, the cost to complete the project is RM451.55 million. The defendant has incurred liabilities of approximately RM184.65 million as at the cut-off date for the construction of the project. Upon the completion of the project, the defendant expects an inflow of RM678.75 million which comprises of the sales of unsold units and its investment properties, cash, bank balance and trade receivables.

[10] As such, the defendant expects a balance of RM42.55 million available for the scheme creditors, which is equivalent to 38% of the LAD owed to the scheme creditors. The defendant will allocate sufficient units in the project to satisfy 40% of the LAD amount.

[11] The primary objective is to complete the project and to ensure that the scheme creditors get the units they contracted to purchase and with a discounted amount of LAD. A payment of the full amount will cripple the defendant rendering any revival of the project academic.

[12] Other salient terms of the SOA are:

(i) the total LAD as at the cut-off date shall be waived or reduced by 60%.

(ii) the balance 40% outstanding LAD due to the scheme creditors as at the cut-off date after item (i) above shall be settled by way of proceeds of sale of units in the project allocated for this purpose ("the assigned properties"), subject to costs as explained in s. 4.2.3(f) of the explanatory statement (ES) ("the settlement sum").

(iii) Baker Tilly Insolvency Sdn Bhd ("BTInsol") shall be the scheme manager to dispose of the assigned properties pursuant to method of disposal as explained in Appendix 5 of the ES.

(iv) the defendant shall provide an irrevocable power of attorney to BTInsol to act as the scheme manager, where BTInsol shall be appointed to act as attorney of the defendant for the purpose of disposing of the assigned properties. This has been done and the power of attorney has been registered at the High Court of Malaya.

(v) BTInsol, in its capacity as the scheme manager shall act as stakeholder to receive and to hold the said proceeds in trust for the scheme creditors.

(vi) the defendant shall ensure that the proceeds recovered from the assigned properties are sufficient to settle the settlement sum.

Legal Considerations By This Court

[13] The Federal Court in *MDSA Resources Sdn Bhd v. Adrian Sia Koon Leng* [2023] 7 CLJ 843 outlined three stages that must be passed before a SOA is approved or sanctioned by a court. They are:

(i) first, either the company, creditors, members of the company, liquidator or judicial manager may apply to the court for leave to convene a creditors' meeting (stage 1 – convening a meeting);

(ii) second, the proposed scheme is presented at the meeting to be agreed upon by a majority of 75% of total value of creditors present and voting, either in person or by proxy (stage 2 – meeting); and

(iii) third, upon obtaining the requisite approval, a further order by the court is to be obtained to approve the SOA (stage 3 – sanction by the court).

[14] From the terms of the proposed SOA, it is clear that the primary objective is to complete the project to ensure that the scheme creditors get the units they contracted to purchase with a discounted amount of LAD. A payment of the full amount will cripple the defendant rendering any revival of the project academic. I do not find this to be in any manner objectionable.

Stage 1 And Stage 2 Fulfilled

[15] I am satisfied that the first two stages have been complied with. To recap, I had granted leave for a CCM to be held and the said meeting was convened on 8 September 2023.

[16] At the CCM, the SOA was approved by 80.02% of the scheme creditors. Thus, there is no further examination required on the first two stages.

Stage 3 Considerations

[17] The issue that I will have to consider at this stage is whether I can go on to approve the said proposed SOA.

Classification

[18] On the classification of creditors, *Transmile Group Bhd & Anor v. Malaysian Trustee Bhd & Ors* [2012] 9 CLJ 1071 is authoritative:

> [44] In response to these contentions, the petitioners, the STL lenders and CB SPV maintain that the classification of all the respondents as creditors in one class is premised upon the law relating to classification as expounded in *Re UDL Holdings Ltd (above)*. They deny that they enjoy any special or overriding interest in ensuring that the schemes should be sanctioned. Instead they point to the rule is that classification is based on the rights of the creditors and not interests. As set out above in *Re UDL Holdings Ltd (above)*:
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> > *... The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests and derived from their legal rights against the company is not a ground for calling separate meetings.* The question is whether the rights which are to be released or varied under the Scheme or the new rights which the Scheme gives in their place are so different that the Scheme must be treated as a compromise or arrangement with more than one class ... (emphasis added)

[19] The current proposed SOA only deals with a single class of creditors. The single class of creditor stems from the fact that all the interveners fall under the definition of a scheme creditor, which is defined as follows:

> Unsecured creditors of GMSB, **comprising the purchasers of units in Harbour City who entered into the Agreements prior to 2 June 2020.** The claims by the unsecured creditors shall be subject to a POD verification exercise. (emphasis added)

[20] Therefore, by virtue of the interveners being purchasers who entered into an agreement to purchase the units within the cut-off period makes them scheme creditors falling under the same classification as the plaintiffs.

[21] As such, I am satisfied that the proposed SOA is addressing the right class of creditors.

[22] I do not accept the interveners' arguments that they no longer fall under the scheme because they have terminated the sale and purchase agreement ("SPA"). With respect, I cannot accept the position they take as the terminations were unilaterally done.

[23] To my mind, the interveners fall squarely within the scheme by virtue of the definition of scheme creditors. Once the proposed SOA passes the requisite threshold of 75% of those who attended the meeting, the interveners are bound by the proposed scheme and the terms stated in the said proposed scheme. Therefore, there is only one class of creditor under the SOA.

Conclusion

[24] Approving a SOA is "not a mere formality". Instead, I must be satisfied not only that the procedural requirements for approval of the scheme by the company creditors have been satisfied, but also that the scheme, is, in substance, a reasonable one.

[25] One of the standard tests to comply is whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. I find this test being satisfied.

[26] Guided by the assessment of facts and the law as outlined in *MDSA Resources Sdn Bhd v. Adrian Sia Koon Leng* (*supra*), I therefore grant sanction as prayed in encl. 45.

[27] I shall now deal with the challenges raised by each interveners.

Challenges Raised By The Interveners

[28] The interveners in encl. 15 and encl. 57 raised a myriad of issues in their quest to persuade this court to not sanction the proposed SOA. However, only challenges which I deem to be worthy of consideration will be addressed in the following paragraphs.

Enclosure 15

Reliefs

[29] The interveners in encl. 15 filed this application claiming for, *inter alia,* the following relief:

> Bahawa CHUA SENG WAI dan ALAN CHUA SENG KIAT adalah dikeluarkan daripada senarai pemiutang-pemiutang skim dan tidak tertakluk kepada Perintah bertarikh 12.06.2023 (Lampiran 12) dalam tindakan ini;

Background

[30] On 30 July 2015, the interveners in encl. 15 and the defendant entered into a SPA for the purchase of commercial unit No. H-10-64 at Harbour City Resort @ Harbour City ("the said unit") at the purchase price of RM741,243.69 inclusive of GST.

[31] Due to delay in delivery of vacant possession of the said unit, the interveners terminated the SPA and filed an action at Melaka Sessions Court. The learned Sessions Court Judge had granted a summary judgment on 14 October 2022 to the interveners. In essence, the learned Sessions Court Judge affirmed that the termination of the SPA is valid and the sum of RM704,181.52 to be refunded but the LAD claim was refused. Aggrieved, the defendant appealed to the Melaka High Court. The matter has been stayed pending the determination of this current proceedings.

[32] It is the interveners' case that they were wrongly included into the SOA as they no longer fall under the class of creditor in the SOA. Moreover, the SOA consist of terms that they claim affect their civil rights.

Issue

[33] The issue to be determined is whether the interveners should be excluded from the SOA on the basis that they are no longer purchasers of the said unit.

Analysis

Unequal Treatment

[34] The interveners in encl. 15 argued that there were a number of purchasers who were allowed to terminate the SPA with the consent of the defendant.

[35] The plaintiffs' counsel, however, explained that about ten to 15 purchasers had terminated the SPA with the defendant. This was done way before the formation of the scheme. Furthermore, the said purchasers were compensated differently such as accepting substitute units in other projects. That was the reason why they were excluded from the proposed SOA. In other words, the said group of purchasers had been dealt with prior to the proposed SOA.

[36] I must accept the explanation of the plaintiffs. This is because the termination was mutual and was agreed upon before the proposed SOA was mooted. To my mind, rightfully, the latter category of purchasers has been rightly excluded from the proposed SOA.

[37] It was also contended that the meeting was not told that there are certain purchasers who had entered into settlement agreement and they were treated differently. This, according to the interveners, would have impacted the meeting outcome as some of the purchasers did not know of the differing treatment given to different purchasers.

[38] In response, the defendant's counsel referred to an email from BTInsol prior to the meeting, which stated purchasers whose SPA's have mutually terminated have been taken out of the proposed SOA. As such, on record, the defendant had been upfront on this issue. It was not something that was clandestinely done.

[39] I accept the explanation of the defendant's counsel and the very fact that an email had been issued on this matter shows that the exclusion of certain groups of purchasers has been made known openly. No material information was kept away from the purchasers who voted at the meeting.

[40] I find no merit in the arguments raised by the interveners and I dismiss the interveners' applications (other than the application to intervene for purposes of participating in the sanction application arguments).

Enclosure 57

Relief

[41] The interveners filed this application in this current proceeding, claiming for, *inter alia*, the following reliefs:

(i) to seek leave to continue the Civil Suit No: MA-B52NCvC-35-05-2023 in the Melaka Sessions Court ("the Melaka suit") filed by the interveners against the defendant, Dato' Tan June Teng Colin, Dato' Tan Ping Huang Edwin, CHY Architects Sdn Bhd and Messrs Hock & Associates;

(ii) a declaration that the interveners are allowed to proceed with the Melaka suit against Dato' Tan June Teng Colin, Dato' Tan Ping Huang Edwin, CHY Architects Sdn Bhd and Messrs Hock & Associates; and

(iii) the interveners' name be removed from the proposed SOA.

Background

[42] On 9 September 2017, the interveners and the defendant entered into a SPA for the purchase of commercial unit No. A-21-35 at Harbour City Resort @ Harbour City ("the said unit") at the purchase price of RM550,551 inclusive of GST.

[43] Due to delay in delivery of vacant possession of the said unit, the interveners terminated the SPA and on 10 January 2023 filed the Melaka suit claiming for refund of all monies paid amounting to RM349,328.96 as purchase price.

[44] On 12 June 2023, RO was granted and the defendant informed the Sessions Court about the said RO. Having been made aware of the RO, the Sessions Court stayed the Melaka suit pending the lapse of the RO.

[45] Clause 3 of the RO stipulates as follows:

> 3. Pursuant to Section 368(1) of the act, *all proceedings in any action and/or any proceedings against the Defendant* including but not limited to enforcement of any security, the commencement or continuing of winding up proceedings against the Defendant and/or any appointment of receiver and/or manager over any and all of the assets of the Defendant, *be restrained for a period of three (3) months from the date of this Order hereof except with leave of Court and subject to any terms as this Court may impose.*
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> (emphasis added)

Issues

[46] Issues to be determined by this court:

(i) whether leave can be granted to enable the interveners to continue with Melaka suit against the defendant and others;

(ii) whether a declaration can be granted to enable the interveners to continue with Melaka suit against the rest of the defendants; and

(iii) whether the interveners' name can be removed from the proposed SOA.

Analysis

[47] Issues (i), (ii) and (iii) will be considered together as the issues must be taken collectively given the overlap in reasoning. The considerations are as follows:

The Interveners Are Scheme Creditors

[48] Perusing the SOA, it is clear that the interveners fall within the definition of scheme creditors. The SOA defines scheme creditors as follows:

> Unsecured creditors of GMSB, **comprising the purchasers of units in Harbour City who entered into the Agreements prior to 2 June 2020.** The claims by the unsecured creditors shall be subject to a POD verification exercise. (emphasis added)

[49] Therefore, by virtue of the interveners being purchasers who entered into a SPA to purchase the said unit within the cut-off period makes them scheme creditors falling under the same classification as the plaintiffs.

[50] Clause 3.1.3 made further clarification on the definition of scheme creditors as follows:

> The Scheme Creditors identified for inclusion in the Proposed SOA to be undertaken and implemented by GMSB have been determined after due consideration to the legal rights of recourse of the Scheme Creditors against:
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> (a) GMSB for the amount owed to the Scheme Creditors for the liquidated ascertained damages **pursuant to the Agreements;**
>
> (b) GMSB in respect of any claim or demand filed by Scheme Creditors against GMSB **pursuant to the Agreements; and**
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> (c) **GMSB in respect of any crystallized and/or contingent claims arising out of subsisting litigation initiated against GMSB.**
>
> (emphasis added)

[51] The term "agreements" is defined as follows in the proposed SOA:

> The following agreements entered into between GMSB and the purchasers of units in Harbour City:

a) Sale and purchase agreement;

b) Deed of mutual covenants;

c) Specific power of attorney; and

d) Tenancy agreement.

[52] Clearly, the interveners' claims in the Melaka suit arise from the abovementioned agreements, and as such, the interveners shall receive the same treatment and carry out the same obligations stipulated as the other scheme creditors under the proposed SOA.

[53] By virtue of cl. 3.1.3(c), it is clear that the SOA covers any crystallised or contingent claims initiated against GMSB. This must include the Melaka suit.

Interveners Bound By The SOA

[54] The importance of attending a CCM cannot be understated as the outcome of the voting is critical in determining whether a proposed SOA is approved. Non-attendance at the CCM must be taken as supporting the proposed SOA. (*MDSA Resources*).

[55] Thus, it is clear that the law places great importance on attending a CCM. If the outcome of the voting at the CCM achieves 75% support of those attending the CCM as stipulated under s. 3663(3) of the Companies Act 2016, the SOA is deemed to be approved.

[56] It is not disputed that 80.2% of the scheme creditors who were present at the CCM voted in favour of the SOA. Given the classification of the interveners as scheme creditors, they are bound by the proposed SOA.

[57] They attended the CCM and exercised their rights as scheme creditors by casting their votes during the said meeting. Hence, irrespective of whether the outcome of the creditor's meeting turned out to be in favour of the interveners or not, they are bound by the decision of the majority of scheme creditors and are estopped from seeking leave to continue with the Melaka suit.

[58] A court, in its supervisory role, should not override the majority views of the plaintiffs as purchasers. This is especially because the entire scheme was initiated by the plaintiffs as purchasers themselves. I cannot be swayed by the interveners who formed the minority. Ultimately, it is the will of the majority that I must protect.

Proposed SOA Mandates The Interveners To Withdraw All Action Against The Defendant

[59] As the interveners are bound by the SOA, they are required to withdraw the Melaka suit. This is consistent with cl. 4.2.3(I) of the SOA, which reads:

> Within thirty (30) days from the Effective Date, *the Scheme Creditors shall withdraw all existing and future legal and arbitration proceedings* against GMSB and/or the directors and/or the officers and/or the shareholders of GMSB, with no order as to costs and execute the necessary documents/affidavits/applications *etc.*, to be promptly filed with the relevant courts, statutory authorities *etc.*, *in order to give immediate effect to such withdrawals of legal and arbitration proceedings against GMSB and/or the directors and/or the officers and/or the shareholders of GMSB.* (emphasis added)

[60] From a reading of the statement of claim of the Melaka suit, it is obvious that the interveners are alleging conspiracy between the defendant and the other defendants in the Melaka suit against the interveners. It is the interveners' claim that as a result of the conspiracy, they are entitled to terminate the SPA and are entitled to full LAD.

[61] The net implication of granting leave to proceed with the other persons in the Melaka suit has the same implication as allowing leave to be granted to the interveners to continue with the suit against the defendant. This is because the case for conspiracy and demand for LAD are interrelated. If a declaration is allowed and the suit is allowed to continue against the rest of the defendants, there will be adverse implications against the proposed SOA.

[62] It is my view that the proposed SOA cannot be exposed to any risk of being disrupted by reason of any litigation or suits. In particular, if the outcome of the legal suit has a financial impact on the defendant.

[63] As such, I find no reason to grant a declaration as prayed by the interveners in their application.

Other Considerations

Claim Purely Monetary In Nature

[64] The interveners contend that if the proposed SOA is sanctioned by this court and is given effect, the interveners would only be entitled to RM54,236.49, which is a far cry from the RM215,012 and RM3,715.60 as claimed by them.

[65] It is beyond doubt that the motivation of the interveners is purely for monetary reasons. It is not uncommon for interveners to seek intervention under the same reasons as seen in this current case. The reason is to avoid the cram-down provision under s. 366(3) of the Companies Act 2016. The cram-down provision has the effect of reducing the amount owed to the creditor. This is what the interveners intend to avoid. Based on the SOA, the scheme creditors will be subjected to 60% reduction of the LAD should the SOA be approved and applied.

[66] Where the creditor's claim is purely monetary in nature, courts will unlikely grant leave. The English High Court in *AES Barry Ltd v. TXU Europe Energy Trading (In Administration)* [2004] EWHC 1757(Ch) is instructive where it held:

> [14] ... where the creditors' claim is simply a monetary one, the court has to carefully scrutinise whether or not it is appropriate to allow that claim to be determined and enforced in advance of the achievement of the statutory purposes and the conclusion of the administration, either by a scheme or, if all else fails, by an order for the liquidation of the Company.
>
> [24] It seems to me that it will only be in exceptional cases, and I do not rule out that there may be such cases, but it will be in exceptional cases that the court gives a creditor, whose claim is simply a monetary one, a right by the taking of proceedings to override and pre-empt that statutory machinery.

See also *Re Top Builders Capital Bhd & Ors* [2021] CLJU 597; [2021] 1 LNS 597; [2021] 10 MLJ 327 and *McCartney & White v. Nortel Networks* [2010] EWHC 826 (Ch).

Ramifications Of The Legal Suits

[67] In considering this matter, I cannot disregard the potential outcome of the Melaka suit.

[68] If the decision is in favour of the interveners, it would mean that the termination of the SPA by the interveners is valid and the interveners would be entitled to the judgment sum, thus depleting the assets of the defendant, which may be distributed to the scheme creditors under the SOA. Furthermore, if the interveners are allowed to execute the judgment against the rest of the defendants in the Melaka suit, the interveners will be given an opportunity to circumvent the SOA, rendering it nugatory.

[69] The interveners rank equally as unsecured creditors together with all the scheme creditors under the SOA. Equity and fairness dictate that interveners should not be afforded preferential treatment over other unsecured creditors.

[70] As outlined above, given the outcome of the Melaka suit will impede the success of the SOA, leave ought not to be granted.

No Exceptional Circumstances To Warrant Leave

[71] In *Re Top Builders* (*supra*), Ong Chee Kwan J dealt with an application for leave to commence legal action against the company. His Lordship held "leave will only be granted in 'exceptional circumstances' and the burden will be on the applicant to show so …".

[72] His Lordship went on to hold that leave will likely be granted "where the commencement or continuation of the legal proceedings does not impede the achievement of the scheme or where it would in fact facilitate and/or assist towards the achievement of the scheme".

[73] The interveners claim that the "exceptional circumstances" are:

(i) that the pleadings in the Melaka suit have closed and pre-trial directions have been given;

(ii) that the Melaka suit is exceptional because the interveners had already terminated the SPA. On the other hand, the plaintiffs in this originating summons intend to proceed with their respective SPA pursuant to the terms and conditions of the proposed SOA;

(iii) that the interveners' claim in the Melaka suit is not entirely a monetary claim as they are claiming for other declaratory reliefs as well;

(iv) that the Melaka suit is not only against the defendant but also against two of its directors, the architect of the said project and the solicitors who prepared the SPA;

(v) the Melaka suit is therefore not only premised on a breach of contract but also on professional negligence, conspiracy as well as fraud. Should leave be refused, the ambit of company law will be pushed beyond its parliamentary-determined limits to unjustly shelter entities and individuals which are not companies from litigation;

(vi) that limitation will eventually set in and the interveners will be deprived of their fundamental right to pursue legal action against the defendant and all the other defendants in the Melaka suit; and

(vii) that the proposed SOA completely fails to consider the rights of purchasers who had terminated their respective SPA and as such are no longer bound by them.

[74] I struggle to see how these are exceptional circumstances. The reasons outlined above are just restating the interveners' contention as to why they must be allowed to continue with the Melaka suit. Reasons for declining the above grounds have been discussed in the preceding paragraphs.

[75] Given that the interveners are bound by the SOA, they are required to discontinue the Melaka suit. This is consistent with cl. 4.2.3(I), where the scheme creditors are required within 30 days from the effective date to withdraw all existing and future legal proceedings against the defendant.

Allegation Of "Scam Of Arrangement"

[76] The interveners argued that the SOA was a scam calculated to benefit the defendants in the Melaka suit, including the defendant. It was argued that the SOA would eventually lead to the interveners being out of time to commence any action by reason of being time-barred. This was the grand design of the defendants.

[77] With respect, I find the argument lacking in merits right from the onset. It is wrong to insinuate that the defendants engineered their way into proposing the SOA. This is because the SOA was applied by the plaintiffs, who are the purchasers of the units developed by the defendant. It was not applied by the defendant.

[78] The majority of the purchasers who attended the meeting wanted to see the project being followed up and continued *albeit* not in the most ideal way. The application to file for a SOA was made to the court as provided under the law. The proposed SOA was by no means a scam. Such outlandish claims simply have no basis and are rejected.

Discrepancy In The Number Of Ballot Papers

[79] The interveners informed the court that police reports have been filed alleging that the CCM was held in a very questionable manner. Foremost, it was submitted that there was discrepancy on the number of ballot papers. The interveners alleged that from their calculation, there were only 362 ballot papers. However, the scrutineer's report stated that there were 754 ballot papers. As such, it was argued that there is a big discrepancy on this issue.

[80] Counsel for the plaintiffs in their reply submissions explained how the 754 ballot papers came about. The court was taken on a step-by-step explanation and it was demonstrated by counsel. It was shown that there was no discrepancy as alleged.

[81] It was explained that the number of ballot papers issued at the meeting was indeed 362 in number. Adding the 554 proxy forms, the number reached 916. However, within the 916, there were duplications of proxy forms totalling 138. Upon deduction of the duplicated proxy forms, the number was then reduced to 778 (916-138). As there were 19 invalid forms and five abstentions, the final number of forms was 754 (778 – (19 +5) = 754).

[82] The ability of counsel for the plaintiffs to explain in clear terms and being able to justify to the court with precision demonstrates the baseless issues raised by the interveners. It was initially painted as a serious discrepancy but when explained, there was nothing that the counsel of the interveners could respond to. It was all smoke without fire.

Non-verification Of The Information Contained In The Explanatory Statement (ES)

[83] It was complained that the information in the explanatory statement (ES) had not been verified or confirmed as true. It was also alleged that none of the information contained in the ES had been independently verified by BTInsol.

[84] In response to this complaint, it was highlighted by the plaintiffs' solicitors that the ES contained a declaration which reads as "the information in the ES in para. 3 has been reviewed and approved by the Board of Directors at GMSB and they individually and collectively accept full responsibility for the accuracy of information contained herein and confirm that after having made all reasonable enquiries and to the best of their knowledge and belief, there are no other facts the omission of which would make any statement contained in this ES misleading".

[85] In determining this issue, I refer to *Top Builders Capital Bhd & Ors v. Seng Long Construction & Engineering Sdn Bhd & Ors* [2022] CLJU 21; [2022] 1 LNS 21; [2022] 3 MLRH 262, where the court held that there was no requirement for the information to be audited at the ES stage. I fully agree with the position taken by the court in *Top Builders,* as it is the most practical position to take. If there is a need to verify each line of the ES, no proposed scheme can take off, defeating the intention of speedy solution that the SOA seeks to achieve.

[86] The ES is merely a document that gives a general proposal of how the scheme would be carried out. It is also meant to be read by those interested at the CCM before they vote. If there were questions that arise as a result of the ES, an explanation can be obtained during the CCM.

[87] The ES had been reviewed and approved by the Board of the defendant and the directors of the defendant have collectively accepted full responsibility for the accuracy and information contained in the ES after having made all reasonable enquiries. I find this to be sufficient for any party interested in the SOA to rely on.

[88] The fact remains that the 80.02% of purchasers who attended the CCM on that day understood the terms contained in the ES and eventually approved the scheme.

[89] I find no merit in the arguments raised by the interveners on this issue and I reject it.

Minutes

[90] It was complained that there was no explanation in the minutes who the observers present at the meeting were. It was also raised that the minutes were not precise and were not properly taken down. None of the questions and answers given to the scheme of creditors had been listed down to show that it had been answered satisfactorily to the scheme creditors.

[91] I do not consider this to be an issue that could vitiate the meeting and its outcome. The number of observers and whether they participated in the CCM is not relevant. Similarly, there is no requirement in the law to ensure minutes are to be exhibited or attached to ensure that the meeting was regularly carried out.

[92] All that is required is a documentation of the proceedings, which evidenced that outcome of the vote taken during the CCM. It must be stressed that the minutes of a CCM is not similar to a generic meeting minutes where follow-up action and confirmation of minutes would be taken in the next meeting. I find this issue to be trivial and ought to be dismissed.

Other Issues

[93] The interveners raised many other trivial issues which touched on the specific terms of the SOA itself. This included the calculation of LAD rate, bad reputation of the defendant as seen in Facebook postings, the deliberate action to file the proposed SOA in Kuala Lumpur instead of in Melaka as well as other issues that do not in any manner dislodge the outcome of the voting on the said day. Whether the defendant had a bad reputation or if there was an ulterior motive to file the action in Kuala Lumpur instead of Melaka would not have any bearing whatsoever to the outcome of the vote. The acid test being the surpassing of the mandatory threshold of 75% of the attending creditors.

[94] I also take the position that those who attended the meeting were given ample opportunity to consider SOA. They then voted in favour of the scheme after considering the proposal put forward. The trivial issues merit no consideration and are collectively rejected.

Finding

[95] It is for the reasons discussed above that I find the application of the interveners found in encl. 57 (other than application to intervene) to be without merits.

[96] Simply put, the interveners fall into the classification of a scheme creditors and must be bound by the terms of the SOA.

[97] To allow the interveners to restart their litigation in the Melaka Sessions Court would enable them to be carved out from the SOA. By doing so, it would make the interveners preferential creditors.

[98] It would also expose the SOA to failure as this would trigger a meltdown of the scheme as the floodgates will be opened to the 18% objecting scheme creditors to embark on a similar recourse.

Conclusion

[99] In conclusion, I allow encl. 45 with no order as to costs. Enclosures 15 and 57 (except application to intervene to participate in the arguments for issuance of sanction under encl. 45) are dismissed with costs of RM5,000.